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Civil Division, Torts Branch

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**By electronic mail only**

August 27, 2002

Thomas J. Frederick, Esquire  
Winston & Strawn  
35 West Wacker Drive  
Chicago, Illinois 60601-9703

Re: United States v. Philip Morris, Inc., et al., Civil No. 99-CV-2496 (GK) (D.D.C.)

Dear Mr. Frederick:

I write as a follow-up to our discussions of today and last Friday, August 23, 2002, concerning the deletion of relevant and responsive electronic mail by certain employees of Philip Morris Incorporated. Specifically, this letter summarizes the initial goals of the parties at this stage of our effort to address the problem and the future issues that will remain. It also identifies information that will facilitate our effort to address the problem jointly with counsel for Philip Morris. Many of the questions posed here are questions that we have asked on one or more previous occasions, by letter and teleconference, and I was disappointed that you did not have any additional information during our call this morning. Indeed, the lack of information on the part of counsel for Philip Morris made the call of little or no utility in the effort to resolve issues in a timely manner. I hope that setting out some of the pressing goals and questions in this format will make future discussions more productive.

As I explained on Friday and again today, we see two primary goals for our discussions and exchange of information: (1) identifying the universe of electronic mail that has been recovered and is available for review in response to the United States' supplementation requests; and (2) identifying the universe of electronic mail that Philip Morris believes is irretrievable so that we can, first, determine whether some or all of that material can in fact be recovered and, second, assess the appropriate relief for the loss of that material which is forever lost. These two goals can be addressed simultaneously -- answering the question of what has been recovered will guide us as to what is irretrievable.

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As set out in our letter of August 13, 2002 and re-stated on August 23 and again today, we understand from your representations that the email recovered by Philip Morris is only a complete, system-wide recovery from October 2001 onward. The sparser, individual-specific electronic back-up available from before that time only extends back from the date documents were collected from those individuals to the prior system-wide deletion at Philip Morris. In order to identify the universe of material presently available for review, therefore, we must obtain answers to three questions:

- From which employees did Philip Morris collect documents?
- When were documents collected from each employee?
- When was the system-wide deletion prior to October 2001 (or, in the event documents were collected from certain individuals before that prior deletion, the most immediate prior deletion to the collection date)?

Once we obtain this information, we will also be able to identify what Philip Morris is presently unable to recover. We assume, based on the limited information we have obtained thus far, that the material recovered will only be responsive to the United States' supplementation requests served pursuant to Order #112 (that is, email dated January 1, 2001 or later) and there will be gaps in that material such that it will not allow recovery of all email that is responsive to the supplementation requests.

Our ability to reach the point where we can establish what electronic mail has in fact been recovered is dependent on the provision of the above-cited information from Philip Morris. When we do so, we hope to be able to proceed quickly with a review of email that is responsive to the United States' supplementation requests. In order to allow that to happen, we ask that you provide the following information:

- Will Philip Morris be able to search the text of email that is recovered?
- What types of searches are possible? For example, is it possible to utilize boolean-type search strings?
- In order to allow us to evaluate these capabilities, we ask that you let us know what type of email system Philip Morris uses and in what format the system-wide back-up and individual employee files are stored.
- Will counsel for the United States be able to review email electronically? If so, can the review take place in Washington, DC?
- How does Philip Morris propose to number or otherwise label electronic mail messages so as to facilitate the selection process by counsel for the United States?

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- From a technical standpoint, how will Philip Morris conduct a privilege screen before making documents available for review by the United States and how long will this take?
- During the review, will attachments be accessible in their original format?
- What steps can be taken to insure that the United States does not review material that has already been produced in this action?
- In order to allow us to evaluate the potential for avoiding unnecessary review of material that has already been produced, please advise us as to which Philip Morris employees failed to follow the company's print and retain policy for electronic mail (alternatively, please advise us if the identity of all such persons is not known).
- Will Philip Morris be able to produce selected documents to the United States in an electronic format?

Due to the present stage of discovery in this action, it is essential that we obtain answers to all of these questions expeditiously so that we can then move on to address questions concerning the timing of production following selection of relevant material by counsel for the United States. Our legitimate concerns about the effect of any structure for post-selection confidentiality and privilege review by Philip Morris are set out in our letter of August 13, 2002.

Finally, in order to allow us to assess whether some of what Philip Morris now claims are irretrievable email messages can in fact be recovered, please provide technical details regarding the manner in which prior system-wide deletions were accomplished as well as the time of all prior deletions. It is quite possible that some of what is now considered to be lost can in fact be recovered.

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I hope this recitation of issues and questions will lead to the provision of responsive information from Philip Morris that will allow us to move forward in our attempt to deal with this issue in the most expeditious and illuminating manner possible.

Very truly yours,

Stephen D. Brody

cc: Cynthia Cecil, Esquire (by electronic mail)  
Jonathan M. Redgrave, Esquire (by electronic mail)  
Leonard A. Feiwus, Esquire (by electronic mail)